b) Heightened standards of review apply here.

1. Petitioner is a protected person subject to "*Strict Scrutiny*" standard of review.

Petitioner, a commercially licensed driver, is a "protected person" pursuant to OSHA and Transportation public safety statutes *(cited* in Appendix I). The federally regulated hazardous material, which injured Petitioner, was shipped into Pennsylvania 'damaged' on Respondent's trailer and reloaded 'damaged' at Respondent's Pittsburgh terminal.

Petitioner's "protected person" status subjects this action to the *strict scrutiny* appellate standard of review.

2. Self-insured Respondent is subject to a heightened *arbitrary and capricious* Standard of Review.

Self-insured Respondent/ *common carrier* is a *fiduciary* by statute and a self-insured employer and decision maker as contemplated in Pinto v. Reliance Standard Life Ins. Co., 214 F. 3d 377,378 (3d Cir. 2000), where the third circuit held insurers to a standard of review commensurate with their duty: "when a [an insurance] company both funds and administers benefits, it is generally acting under a conflict that warrants a heightened form of the *arbitrary and capricious* standard of review. Id.

Respondent violated federal regulations by not properly repackaging its damaged shipment and attaching Chemrex Material Safety Data Sheet (MSDS), before reloading it for local deliveries from the Pittsburgh terminal.

Petitioner was given no warning that Respondent's illegally loaded HM shipment was damaged, no protective equipment and was not sent for emergency medical treatment, pursuant to MSDS instructions in Respondent's possession and contrary to its OSHA Settlement Agreement.

c) Respondent's Motion to Dismiss

State courts erred by failing to construe allegations and evidence in favor of Petitioner, affirming Respondent's 2001 Motion to Dismiss un-litigated perjury and fraud allegations. There is no preclusion on state court decisions upholding dismissal, which are not supported by procedural due process. "In a federal action following a state court action, the state court judgment is not given preclusive effect when the party against whom the decision is rendered did not have a full and fair opportunity to litigate the claim or issue in state court." Haring v. Prosise, 462 U.S. 306 (1983).

The courts' failure to construe pleadings in favor of Petitioner constituted a legal error, in violation of federal statute and Petitioner's 14th Amendment due process rights. "In the procedural context of a Motion to Dismiss, we accept the factual allegations as true and plaintiff receives the benefit of all reasonable inferences to be drawn therefrom. Angelastro v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). We may not affirm the dismissal of the complaint unless plaintiffs can prove no set of facts that would entitle them to relief. City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 41, 45-46, (1957). State courts failed to construe 'perjury and fraud' allegations in favor of Petitioner, and inequitably applied the law to dismiss Petitioner's disability claim, a Fourteenth Amendment violation.

Judicial failure to enforce express statutes, **II**, p.15, including Respondent's liability to pay Petitioner's medical and pharmaceutical expenses; unfairly distributed the burden to pay. Petitioner's medical expenses were paid by family members, Veterans Administration funds and a union health and welfare ERISA fund, which notified Petitioner of its intent to subrogate, **II**, p.71.

d) Respondent Admissions Contradict Dismissal.

Self-insured Respondent had *common carrier* statutory Constructive Notice of its MSDS duty to warn and protect Petitioner prior to the 'exposure' accident; and Actual Notice on February 29, 1996 when Chemrex MSDS was received, direct knowledge of its duty for 'exposure to Dioxane' and treatment of symptoms that Dioxane caused inhalation injury.

Respondent *scienter* may be construed by *strict scrutiny* of incomplete and false representations it made in litigation. Judicial failure to equitably enforce the law constituted 14th Amendment violations of Petitioner's right to due process.

Self-insured Respondent's[1] made false statements:

a) "..minor changes in the wording of the two petitions,"
1996 Petition alleged exposure to poison, Respondent denied 2001 Petition alleged perjury, Respondent claim res judicata.

b) "...the first Claim Petition was fully litigated"
1996 Notice of Denial was litigated contrary to MSDS. 2001 allegations of 1996 perjury/ fraud never litigated.

c) "...the findings are supported by substantial evidence",
1997 Decisions, adverse to Petitioner, make no MSDS reference and Respondent's report is inadmissible hearsay. Evidence from Petitioner's treating physician capriciously disregarded, Respondent's inadmissible report adopted.

"Petitioner's argument appears to be based upon the *allegation* that Respondent did not provide Material Safety Data Sheets concerning the chemical which was the source of the exposure."

"Petitioner produced this evidence at the hearing held after the filing of the second [2001] Petition."

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[1] Respondent's Brief in Opposition to Petition for *Writ of Certiori*, p. 6.

Respondent's Admission[2] Contradicts Dismissal:

> "If the chemical were known at the time of the prior litigation, or there had been a denial that it was hazardous, this claim would conceivably have **merit.**"

Respondent makes a false representation[3] on the statutory relevance of Chemrex *"Material"* Safety Data Sheets:

> "Therefore, the precise nature of the chemical is irrelevant because it was found that the Petitioner was not injured by this exposure."

> "This formed the basis of the denial of Petitioner's Request for a Rehearing. Since no injury was proven, the nature of the chemical was immaterial, and the Request for Rehearing was properly denied."

Rehearing is warranted by violations of due process where state courts affirmed Respondent's Motion to Dismiss without a hearing to admit Petitioner's evidence.

Under the Fourteenth Amendment, due process mandates that once a state has created rights or benefits, these benefits may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a

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[2] Id. at p.7
[3] Id. at p. 7

person's right to enjoy what is his, free of governmental interference. Id.

Respondent's decision to withhold Chemrex MSDS in 1996; trial statements made by Respondent's Counsel denying that Petitioner was 'exposed,' **II**, p.122, to 'poison' or that the containers were 'damaged' **II**, p.132; and the fact that it submitted a false report, **II**, p.97, must be construed in favor of Petitioner. Respondent makes admissions that must be construed in favor of Petitioner, and Dismissal reversed.

d) **Pennsylvania Authority Holds Respondent Liable.**

Petitioner continued to work for two weeks after the accident and was never advised to go for medical treatment for respiratory complaints reported. Respondent never advised Petitioner to stop wearing the jacket 'exposed' on the date of accident. Petitioner violated no law by going on a vacation planned before the accident; he was too ill to enjoy the trip; he may not have traveled if he had the MSDS. Respondent bears the burden to prove its Notice of Denial

Respondent did no vocational assessment and offered Petitioner no alternative employment. Respondent made no attempt to return the injured employee to productive employment. Instead, Respondent litigated to avoid paying compensation, contrary to Pennsylvania authority. Giant Eagle v. Workers' Com. Appeal Bd. (Myers), 578 Pa. 94, 103-104 (Pa. Sup. Ct. 2004), *citing* Kachinsky v. W C AB (Vepco), 532 A.2d 374 (Pa. Sup. Ct. 1987). Respondent failed its duty to propose alternate work that is actually available, that claimant is capable of doing such work, and that claimant is given actual notice of the available work. Hockenberry v. Workers' Comp. Appeal Bd., 672 A.2d 393, 395 (Pa. Cmwlth. 1996).

State courts affirmed self-insured Respondent's Motion to Dismiss based on *res judicata* and *collateral estoppel* defenses to fraud and perjury allegations never litigated, an unprecedented exercise of judicial authority. Respondent cited workers' compensation cases where disability benefits had been received, not denied.

III. Respondent's Contest of Petitioer's Claim Is A Legal Position Contrary To Its DOL Compliance Agreement Based on the Same Operative Facts.

State courts failed to exercise concurrent jurisdiction to enforce Petitioner's statutory rights under federal law. The district court exercised concurrent jurisdiction in its Order at W.D. 78 cv 791 H, enforcing the National Master Freight Agreement against Respondent, where the district court construed allegations and admissions with the evidence. The district court held that: "An award may be vacated where it is shown that there was fraud, partiality, or other misconduct or where it violates a specific command of some law, or, where the award is inconsistent with public policy." *Citing* Black v. Cutter Laboratories, 43 Cal. 2d 788, 798, 278 P. 2d 905, 911 (1953). The district court held that provisions of the Vehicle Code, designed and intended by the state legislature to promote safe and proper use of its highways, constituted law and public policy; and that upholding a violation of law, as state courts did here, was contrary to public policy. State court failure to enforce statutory rights and duties, here, is a 14th Amendment violation adverse to Petitioner.

CONCLUSION

WHEREAS, state courts failed to apply heightened standards of review; to enforce Respondent's statutory duty; inconsistent with public policy, and a violation of Petitioner's 14th Amendment right to equal protection under the law. Petitioner requests that this court grant a Rehearing on the Petition for *Writ of Certiorari* in the instant matter.

Respectfully submitted,

10/20/05

_____

Mary Ellen Chajkowski, Esquire
Petitioner's Counsel of Record

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

APPENDIX II

No. 05-4

In The

Supreme Court of the United States

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

On Petition for Rehearing
To the Supreme Court of the United States

Petition for Rehearing

Mary Ellen Chajkowski, Esq.
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